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BRIEFS

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In the Supreme Court of the United States

ADVOCATE HEALTH CARE NETWORK, ET AL.,
PETITIONERS

v.

MARIA STAPLETON, ET AL.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 ("ERISA") provides significant protections for employees' pensions, but it includes an exemption for a "church plan." 29 U.S.C. §1003(b)(2). A "church plan" is a pension or welfare plan "established and maintained ... by a church," *id.* §1002(33)(A), which "includes" a plan "maintained" by a pension board or similar administrative organization controlled by or associated with a church, *id.* §1002(33)(C)(i). All three courts of appeals to consider the issue have concluded without dissent that the exemption does not extend to plans that were not "established ... by" a church, and that therefore a pension plan established by a giant health care provider like the one involved here is not exempt from ERISA.

The question presented is:

Whether a pension plan for employees of a giant health-care provider is exempt from—and therefore its participants are unprotected by—ERISA, even though the plan concededly was not "established" by a church.

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STATEMENT

Petitioner Advocate Health Care Network, the largest health-care provider in Illinois, is a nonprofit corporation that operates twelve hospitals and more than 250 health-care facilities. In 2012, Advocate had more than 33,000 employees and operating revenues of $4.6 billion. Pet. App. 5a, 31a. Its operations are in all significant respects identical to the operations of its nonprofit (and, to a great degree, for-profit) competitors. "There is no requirement that Advocate employees or patients belong to any particular religious denomination, or uphold any particular religious beliefs." *Id.* at 5a. Advocate is not a church.

The petition represents Advocate's attempt—in the face of consistent rulings (without dissent) by the only three courts of appeals to address the issue—to exempt its pension plan from ERISA on the ground that it is a "church plan." 29 U.S.C. §1003(b)(2). Those appellate decisions, and not the ex parte, non-binding private letter rulings that petitioners cite, constitute the precedential authority on this issue. Exempting petitioner's plan from ERISA would return Advocate's 33,000 employees to perilous pre-ERISA conditions and would give Advocate an unjustifiable advantage over most of its nonprofit (and for-profit) competitors in the health-care industry, who must comply with ERISA.

Congress enacted and amended a "church plan" exemption from ERISA in order to avoid government examination of confidential church books and records. Although Congress permitted churches to extend benefits to employees of church-associated schools and

hospitals, Congress did not, and had no reason to, allow giant businesses like Advocate to create their own ERISA-exempt benefit plans, simply because they claim a religious affiliation. Indeed, had Congress enacted the exemption petitioners seek, such a pure preference for religiously connected institutions, without any need to accommodate religious faith or practice, would have violated the Establishment Clause.

ERISA makes clear that plans like Advocate's are not exempt, as the court below and each of the other courts of appeals that have ruled on the issue have concluded. The petition should be denied.

1. ERISA was designed to remedy "the lack of employee information and adequate safeguards" and the "inadequacy of current minimum standards" for pension (and welfare) plans. 29 U.S.C. §1001(a). ERISA "seek[s] to ensure that employees will not be left empty-handed once employers have guaranteed them certain benefits." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996).

ERISA includes an exemption for "church plan[s]." 29 U.S.C. §1003(b)(2). "The term 'church plan' means a plan established and maintained for its employees by a church or by a convention or association of churches[.]"[1] *Id.* §1002(33)(A) (1974). The purpose of that exemption was to avoid "examinations of books

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[1] "Church," as used herein, refers to any church or convention or association of churches. It also refers to a synagogue, mosque, or other house of worship.

and records" that "might be regarded as an unjustified invasion of the confidential relationship ... with regard to churches and their religious activities." S. Rep. No. 93-383 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4889, 4965. The version originally enacted in 1974 temporarily (until 1982) permitted pre-existing plans "established and maintained by a church" to cover employees of church-affiliated agencies. 29 U.S.C. §1002(33)(C) (1974).

In 1980, Congress amended the church plan exemption to address two concerns. First, churches wanted continuing authority, past 1982, to include employees of church-affiliated agencies in their plans. Second, the requirement that church plans be "maintained" by a church was of concern to certain churches that used distinct financial services organizations (often called "pension boards") to maintain and administer their pension plans. Pet. App. 19a.

To address the 1982 sunset provision, Congress amended the definition of "employee" under the church plan definition, such that an "employee of a church ... includes ... an employee of an organization ... which is controlled by or associated with a church." 29 U.S.C. §1002(33)(C)(ii)(II); *see also id.* §1002(33)(C)(iii) (church shall be "deemed" employer of such "employee[s]"). Because a "church plan" was still defined as "a plan established and maintained ... *for its employees* ... by a church," *id.* §1002(33)(A) (emphasis added), the amendments allowed churches to include in their benefit plans not only their own employees, but also employees of certain church-associated organizations.

To address churches that maintained their plans through separate organizations, i.e., pension boards, Congress enacted the provision at issue here:

> A plan established and maintained for its employees ... by a church or by a convention or association of churches includes a plan maintained by an organization, ... the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

Id. §1002(33)(C)(i). A church could now retain the exemption even if it turned over maintenance of its plan to an organization primarily engaged in plan management and controlled by or associated with the church.

2. Advocate provides retirement benefits for its more than 33,000 employees through the Advocate Health Care Network Pension Plan (the "Plan"). The Plan was established by, and is maintained by, Advocate. Advocate believes that the Plan is an exempt church plan, and it therefore "does not fund, insure, or administer" the Plan in compliance with ERISA. Pet. App. 5a.

Respondents are current and former employees of Advocate with claims to benefits under the Plan. They brought this action against Advocate and the other petitioners, who are involved in the administration of the Plan. The complaint alleges that petitioners and the Plan violated ERISA because, *inter alia*, the Plan

imposed an improperly long five-year vesting period and petitioners failed to follow ERISA's reporting and disclosure requirements and failed to insure and adequately fund the Plan. Pet. App. 4a. Respondents seek a declaration that the Plan is not a church plan under ERISA, an injunction requiring petitioners to reform the Plan to comply with ERISA, and civil penalties and damages. Pet. App. 6a.

Respondents allege that, because the Plan was not "established" by a church, it does not qualify as an exempt church plan. That is the issue decided by the court of appeals, in respondents' favor. Respondents also allege two alternative, and independent, reasons why the Plan does not qualify as a "church plan" under the statute. *See infra* pp. 36-37; Pet. App. 4a-5a. Finally, even if the Plan satisfied the statutory requirements, respondents allege that it would nonetheless be subject to ERISA because such a bald religious preference for a religiously-affiliated institution, unrelated to any need to accommodate religious faith or practice, would violate the Establishment Clause. *See infra* pp. 34-35.

3.a. The district court denied petitioners' motion to dismiss the complaint, holding that the Plan "is not entitled to ERISA's church plan exemption as a matter of law" because it was not established by a church. Pet. App. 49a. The court first addressed subsection 33(A), noting that "[t]wo separate elements must both be met for the exemption to apply: a church must first create (establish) the plan and then run (maintain) the plan." Pet. App. 37a. It then explained that "the plain language of subsection 33(C)(i) merely adds an alternative means of meeting *one* of subsection 33(A)'s

two elements—and nothing more." Pet. App. 40a.

The court found that, "faced with the fact that many churches delegated the actual management of benefits plans to associated third-party entities as a practical matter, Congress moved to ensure that the church plan exemption reflected this reality." Pet. App. 46a. "Viewed in this context, Congress's purposeful choice to limit the wording of subsection 33(C)(i) to plans *maintained* by eligible organization makes perfect sense, and its omission of those *established* by such entities appears deliberate." *Id.* (emphasis added).

b. The district court certified the following question for interlocutory appeal under 28 U.S.C. §1292(b):

> In order for an employee benefit plan to qualify as a "church plan" under ERISA, 29 U.S.C. §1003(b)(2) and [§1002(33)], must the plan be established by a church (or by a convention or association of churches)?

Pet. App. 53a.

4.a. The court of appeals affirmed, without dissent. Pet. App. 1a-29a. Expressly agreeing with *Kaplan v. Saint Peter's Healthcare System*, 810 F.3d 175 (3d Cir. 2016), *petition for cert. filed*, July 18, 2016 (No. 16-86), the court held that "the plain language of [subsection] (33)(C) merely adds an alternative meaning to one of subsection (33)(A)'s two elements—[the] 'maintain' element—but does not change the fact that a plan must still be established by a church." Pet. App. 11a.

The court noted that "[l]oyalty to the plain language principle is particularly important in this case," because "[e]mployees of religiously-affiliated hospitals are not immune from the perils of unregulated pension plans." Pet. App. 17a. The court noted examples of religiously affiliated hospitals that operated plans without complying with ERISA. When those plans ran into trouble and left employees with underfunded and uninsured pensions, there was no remedy. "[B]ecause no church had established those hospitals['] plans, there was no church to accept responsibility for the fate of the participants' retirement benefits." Pet. App. 17a-18a. "One need not impute a nefarious motive to the administrators of these plans in order to recognize the import of the ERISA protections." Pet. App. 18a.

The court found that, while the language resolved this case, the legislative history also "supports the correctness of the straightforward, rather than expansive reading of subsections (33)(A) and (33)(C)." Pet. App. 18a. Congress's attention had been called to the difficulties created by the original statute for churches that "used distinct financial services organizations, which were separate from but controlled by the denomination, to maintain and administer their pension plans (the pension board problem)." Pet. App. 19a. The court explained that "the additional language added in subsection (33)(C)(i) resolved" that "logistical problem." Pet. App. 21a. Committee reports and statements by the legislation's sponsor "emphasized that the language was added merely to clarify that a church plan could be maintained by a pension board." *Id.*

The court rejected petitioners' argument that non-precedential, ex-parte IRS letter rulings or hypothesized congressional acquiescence in those rulings (of which there was no reason to believe Congress knew) should alter its conclusion. Pet. App. 24a-26a. The court easily disposed of petitioners' argument that they were constitutionally *entitled* to a broadened church plan exemption, noting that "Congress has ... on numerous occasions ... distinguish[ed] between churches and other religious organizations without constitutional concern." Pet. App. 27a (citing cases).

b. Judge Kanne joined the majority opinion and wrote a separate concurring opinion to "emphasize that this is not one of those cases" in which a statute "compel[s] entities to provide services that violate their religious beliefs." Pet. App. 29a (citing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)).

REASONS FOR DENYING THE PETITION

The courts of appeals have uniformly agreed that a church plan must be established by a church. They have correctly held that giant health-care organizations like Advocate must provide ERISA-mandated minimum protection and insurance for their employees' pension plans, just like Advocate's secular competitors are required to do. Further review, especially at this interlocutory stage of this case, is unwarranted.

I. THE ONLY THREE COURTS OF APPEALS TO ADDRESS THE ISSUE HAVE AGREED, WITHOUT DISSENT, THAT A CHURCH PLAN MUST BE ESTABLISHED BY A CHURCH

All three courts of appeals that have addressed the issue have reached the same conclusion: subsection 33(A)'s requirement that an ERISA-exempt church plan be "established" by a church was not altered by subsection 33(C)(i)'s specification that a church plan can be "maintained" by a church-affiliated organization that satisfies certain requirements. All three courts rejected the same arguments petitioners make here without dissent and without any suggestion that they found the issue a difficult one. While petitioners cite two earlier decisions of other courts of appeals, those decisions did not address the question presented here. Accordingly, the question presented here remains open in those two circuits. There is no conflict.

A. The Third, Seventh, and Ninth Circuits Have All Rejected Petitioners' Arguments Without Difficulty

1. Citing the Third Circuit's earlier decision in *Saint Peter's*, the Seventh Circuit here explained that "the plain language of (33)(C) merely adds an alternative meaning to one of subsection (33)(A)'s two elements—[the] 'maintain' element—but does not change the fact that a plan must still be established by a church." Pet. App. 11a. While the court found "resort to statutory history unnecessary," Pet. App. 18a, the court examined that history and found that Congress enacted subsection 33(C)(i) to permit churches to operate their plans through legally distinct pension

boards, not to open up a broad new exemption for concededly non-church entities like Advocate. Pet. App. 18a-24a. The court also easily dismissed petitioners' secondary arguments based on a non-precedential IRS private letter ruling, Pet. App. 24a-26a, and their speculative constitutional arguments as well, Pet. App. 26a-29a.

2. In *Saint Peter's*, the Third Circuit considered exactly the arguments petitioners present here, and concluded that "the statute has a plain meaning, and that meaning sets the result." 810 F.3d at 180. As the court explained, "[t]he 1980 amendments provided an alternate way of meeting the maintenance requirement by allowing plans maintained by church agencies to fall within the exemption[], [b]ut they did not do away with the requirement that a church establish a plan in the first instance." *Id.* Like the Seventh Circuit, the Third Circuit found that the legislative history further supported its conclusion. *Id.* at 182-85. Like the Seventh Circuit, the court also rejected the hospital's reliance on non-precedential IRS rulings, *id.* at 185-86, and held that petitioners' Religion Clause arguments were without merit. *Id.* at 186.

3. In *Rollins v. Dignity Health*, 2016 WL 3997259 (9th Cir. 2016), *petition for cert. filed*, Aug. 29, 2016 (No. 16-258), the Ninth Circuit agreed with each of its sister circuits that, "to qualify for the church-plan exemption ..., a plan must have been established by a church *and* maintained either by a church or by a principal-purpose organization." *Id.* at *3. The court concluded that "it is reasonably clear from context that a plan maintained by a principal-purpose organ-

ization satisfies the requirement that it be maintained by a church, but that the plan qualifies as a church plan only if it was also established by a church." *Id.*

Like the Third and Seventh Circuits, the Ninth Circuit also concluded that its "reading is supported by legislative history." 2016 WL 3997259, at *4. By adding subsection 33(C)(i), Congress "addressed only the problem of maintenance by church-controlled or church-affiliated pension boards." *Id.* The court supported that conclusion with numerous citations to the legislative record, each of them to the effect that the original definition of a church plan "would be continued" but "clarified to include church plans which rather than being maintained directly by a church are instead maintained by a pension board maintained by a church." *Id.* (quoting Sen. Labor & Hum. Resources Comm. Rep. on H.R. 3904 (Aug. 15, 1980)).

4. In short, three courts of appeals have examined precisely the arguments that petitioners make here and rejected them. The Seventh Circuit here noted that it "sid[ed] with our colleagues on the Third Circuit." Pet. App. 4a. The Ninth Circuit in *Dignity* noted that "[t]he other circuit courts that have considered the question agree with" its ruling. 2016 WL 3997259, at *3. There was no dissent in any of the three courts.

B. The Question Presented Here Was Not Before the Fourth and Eighth Circuits.

Contrary to petitioners' contention, neither *Lown v. Continental Casualty Co.*, 238 F.3d 543 (4th Cir. 2001), nor *Chronister v. Baptist Health*, 442 F.3d 648 (8th Cir. 2006), conflict, or are even in any tension,

with the uniform decisions of the Third, Seventh, and Ninth Circuits. The question of statutory interpretation in this case was neither argued to, nor considered by, either *Lown* or *Chronister*, and the Fourth and Eighth Circuits are entirely free in future cases to agree with the decision here.

1.a. In *Lown*, an employee filed suit in state court, claiming benefits due under the disability plan of her employer, Baptist Healthcare. The plan's fiduciary removed the case. Reversing the posture here, the fiduciary argued that there was federal jurisdiction—and that state law was preempted—because the plan was governed by ERISA. The employee then sought a remand on the ground that the plan was a church plan exempt from ERISA. The court rejected the employee's argument, concluding that the plan was not a church plan because Baptist Healthcare was not controlled by or associated with a church. 238 F.3d at 547-48.

Determining whether a plan must be "established by" a church was not a prerequisite to the *Lown* court's conclusion. *Contra* Pet. 24. To qualify as a church plan, a plan must satisfy multiple other independent and necessary conditions. For example, if not maintained by a church, the plan must be maintained by an organization whose "principal purpose" is the "administration or funding of a [welfare or retirement] plan." 29 U.S.C. §1002(33)(C)(i). And that organization must also be "controlled by or associated with a church or a convention or association of churches." *Id.* *Lown* held that the organization failed to satisfy that latter condition.

b. Notably, the court in *Lown* did not consider or discuss whether the plan actually was established by a church. That is not surprising, because neither party argued that that fact had any relevance.

The defendant fiduciary did not argue that a church plan must be established by a church. Instead, the fiduciary argued that the church plan exemption did not apply because the plan failed to satisfy the requirement in subsection 33(B)(ii) that "substantially all of the individuals included in the plan" be employees of a church or an organization controlled by or associated with a church pursuant to subsection 33(C)(ii). 2000 WL 33992470, at *24, *27. Similarly, although the employee's opening brief cited subsection 33(A)—the basic "established and maintained by" requirement—it did not discuss whether subsection 33(A) limited the exemption to church-established plans. 2000 WL 33992471, at *19. The employee's reply brief contained nothing relevant to the issue here. *See* 2000 WL 33992472.

c. Petitioners quote one sentence in the *Lown* opinion stating that "a plan established by a corporation associated with a church can still qualify as a church plan." Pet. 22 (quoting 238 F.3d at 547). But that passing comment on an unlitigated issue was merely the prelude to the court's discussion of the "controlled by or associated with" issue that the parties briefed and the court decided. Aside from that comment, which was unaccompanied by any discussion or reasoning, the court did not discuss the "established by" requirement, construe subsection 33(A), or discuss the relationship between subsections 33(A) and 33(C)(i).

The sentence cited by petitioners therefore cannot be taken as a holding on the question presented here. As the Seventh Circuit recognized, the quoted sentence was "mere dicta, for [*Lown*] ultimately decided that the exemption did not apply because the hospital was not associated with or controlled by a church." Pet. App. 16a. The Third Circuit in *Saint Peter's* similarly recognized the comment in *Lown* as "dictum," and noted that it was itself "the first Circuit to decide the question in a holding." 810 F.3d at 179.

2. The Eighth Circuit in *Chronister* also was not asked to rule on the question presented here and did not do so. Indeed, petitioners cannot even cite an offhand sentence, like the one in *Lown*, that could be seen to address the issue even tangentially. *See* Pet. 23. Like *Lown*, *Chronister* arose from a state-court suit by an employee seeking disability benefits under an employer-sponsored plan. As in *Lown*, the defendant removed the case to federal court while the employee sought remand on the ground that the disability plan was an ERISA-exempt church plan. The Eighth Circuit held that to resolve the case, it "must determine whether [the employer] is controlled by or associated with [a] ... church." 442 F.3d at 652. The court's opinion addressed only that question, holding that the employer did not satisfy that requirement. *Id.* at 654.

As in *Lown*, the court in *Chronister* did not discuss whether the plan was established by a church. Nor did the parties make any argument suggesting that the establishment of the plan was relevant. Their briefs on the church-plan issue were entirely devoted

to arguing that the employer was, or was not, "controlled by or associated with" a church. *See* 2005 WL 5628839 (Br. of Appellant); 2005 WL 5628840 (Br. of Cross-Appellee and Reply Br. of Appellant); 2005 WL 5628844 (Br. of Appellee/Cross-Appellant Unum Life Insurance Company).

3. A court is "not bound to follow [its] dicta in a prior case in which the point now at issue was not fully debated." *Cent. Va. Cmty Coll. v. Katz*, 546 U.S. 356, 363 (2006); *accord, e.g., Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1368 (2013). That principle applies doubly to *Lown* and *Chronister*. Not only was the question here "not debated" or even raised in those cases, but the key fact that would make the question potentially relevant—whether a church had established the plan at issue—was not addressed by the parties or the courts. The Fourth and Eighth Circuits are not presently bound to rule one way or the other on the question presented here.[2] Those courts

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[2] Petitioners' argument (Pet. 24-25) that a qualified comment ("pretty much") by a district judge at a motions hearing somehow establishes that *Lown* is binding precedent on the issue here is self-refuting. Indeed, the judge also commented at the same hearing that "[y]ou may not be required to follow the *dicta* [of] appeals courts, but you're wary about straying too far from them when you're a district judge." *Lann v. Trinity Healthcare Corp.*, No. 14-2237, Hr'g Tr. 25:18-20, Feb. 23, 2015, Dkt. # 72 (emphasis added). Although petitioners cite (at Pet. 25) *Thorkelson v. Publishing House of Evangelical Lutheran Church*, 764 F. Supp. 2d 1119, 1127 (D. Minn. 2011), for the proposition that *Chronis-*

are likely to have the opportunity to address the issue in new cases currently pending in their district courts. *See* Pet. 14-15. There is no reason to believe that, when they do so, they will deviate from the plain statutory text and the unanimous decisions of the Third, Seventh, and Ninth Circuits.

II. GRANTING REVIEW WOULD PUT ADVOCATE'S 33,000 EMPLOYEES AT RISK AND IS UNWARRANTED AT THIS INTERLOCUTORY STAGE

As this litigation proceeds, Advocate's 33,000 employees must endure the costs and risks of Advocate's legally inadequate pension plan, while Advocate reaps competitive advantages in the marketplace from its ability to operate a substandard plan. No circuit has agreed with petitioners, and there is nothing else that would indicate that petitioners' argument has sufficient merit to warrant this Court's attention, especially at this interlocutory stage.

A. There Is No "Settled Law" that Supports Petitioners' Interpretation

Petitioners argue that further review is warranted because "[i]t has been settled law for well over thirty years that pension plans maintained by otherwise qualifying church-affiliated organizations are exempt

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ter is binding precedent on this issue, *Thorkelson* in fact establishes the opposite. The district court there merely asserted that the Eighth Circuit in *Chronister* "voiced no concern" about whether a plan must be established by a church—not surprisingly, since no one in *Chronister* raised the issue. That district court then reached its own (incorrect) conclusion on the question based on a cursory statutory analysis. *See* Pet. App. 15a.

from ERISA ... , whether or not a church itself established the plan." Pet. 1. "Settled law," however, is created by decisions of courts or, at most, agency rulings that are intended to state the agency's considered view on a subject. As shown above, the law in the courts of appeals is contrary to petitioners' position, and no agency has made any precedential or reliance-worthy rulings on the subject.

1. Petitioners rely on a memorandum issued for internal agency use by the IRS's general counsel in 1982. IRS Gen. Couns. Mem. 39,007, 1983 WL 197946 (Nov. 2, 1982). That memorandum instructs that it "is not to be relied upon or otherwise cited as precedent by taxpayers." *Id.* at *6. It therefore certainly cannot be taken as "settled law," or, indeed, as "law" in any sense. And in any event, because it was not a result of "formal adjudication or notice-and-comment rulemaking," its interpretation receives deference from the courts "only to the extent that [it has] the power to persuade." *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (citation omitted).[3]

The memorandum has no "power to persuade." Although it has apparently been followed in practice and without any substantive consideration by the IRS, the PBGC, and the Department of Labor, the

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[3] Petitioners derive no support from cases in which this Court has granted review to consider a court's invalidation of a formal, nationwide rule (or of an agency's failure to promulgate such a rule). *See* Pet. 18. Here, no agency has ever stated its position on the issue in a rule or regulation, or in any other format designed to be relied on by the public.

memorandum itself provides no analysis to support its conclusion. As the Third Circuit explained, it "does not even consider the church establishment requirement of [subsection] 33(A). Rather, it skips directly (and inexplicably) to [subsection] 33(C)." *Saint Peter's*, 810 F.3d at 185; *see also* Pet. App. 25a (noting that the memorandum "conflicts with the plain language of the statute and wholly fails to consider the relationship between definitions of a church plan in subsections (33)(A) and (33) (C)(ii)"); *Dignity*, 2016 WL 3997259, at *7 (finding memorandum "unpersuasive" because "[i]t is based on an obvious misreading of the statutory text, and it ignores the relevant legislative history").

2. In short, the perfunctory IRS general counsel memorandum did not, and could not have, set forth "settled law" on the issue in this case. The same is true of later-issued private letter rulings, which also "may not be used or cited as precedent." 26 U.S.C. §6110(k)(3). Those letter rulings do not *analyze* the statute; they merely *restate* the statutory text before applying the conclusion of the general counsel memorandum. Advocate and other recipients of private letter rulings may be entitled to rely on such letters *vis-à-vis* the IRS with respect to the tax-qualification status of their benefit plans.[4] But petitioners cite no authority indicating that recipients of such letters—much less *other* entities—are entitled to rely on the

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[4] *See* IRS Rev. Proc. 2016-1, §2.01, 2016 WL 20933 (Jan. 4, 2016) (a "letter ruling" is a response to a taxpayer's inquiry "about its status for tax purposes or the tax effects of its acts or transactions."); *id.* §11.01.

informal position of the IRS as a justification for denying plan participants the protections to which they are entitled under ERISA.

3. Petitioners' concerns regarding a lack of national uniformity ring hollow. Pet. 25-26. The law *is* uniform—every circuit that has addressed this issue has reached the same result; plan sponsors have no contrary authority on which to rely if they choose to continue to treat non-church-established plans as church plans. Moreover, uniformity supports the decisions of the Third, Seventh, and Ninth Circuits; petitioners' exemption from ERISA would mean that plans like Advocate's are subject to the varying substantive and remedial laws of fifty different States. *See, e.g.*, *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 945 (2016); *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 148 (2001).

4. Petitioners contend that the "vast majority of benefit plans currently operated as church plans were not established by churches themselves." Pet. 17. Petitioners' carefully worded assertion merely reflects the fact that hundreds of church-associated hospital conglomerates, often at the urging of "gotcha" (Pet. 22) benefit consultants, have in recent decades exploited a misreading of ERISA to lower their costs by claiming church-plan status for plans that had been operated—correctly—as ERISA plans. *See infra* pp. 23-24. That traditional church-established plans have rarely sought IRS private letter rulings, Pet. 17, is not

surprising, since there is no question that a plan established by a church satisfies the statutory church-plan definition.[5]

B. Further Delay of this Litigation Would Impose Severe Costs on Advocate's Employees

1. Imposition of minimum standards on pension plans and ensuring that employees actually get the benefits promised by such plans are essential goals of ERISA. *See* 29 U.S.C. §1001(a). To give security to employees who worked for years in reliance on pension promises, Congress required increased "disclosure and reporting" by pension (and welfare) plans. *Id.* §1001(b). It also sought to "improv[e] the equitable character and the soundness of ... plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance." *Id.* §1001(c).

2. Prior to ERISA, there was a sadly extensive record of employees being left with little or nothing to show after years of reliance on an employer's promises of pension benefits. *See, e.g.*, *Nachman Corp. v.*

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[5] This case does not present the question whether certain plans covering clergy were actually "established" by pension boards, Pet. 17-18, or whether instead, consistent with subsection 33(A), such plans were established by conventions or associations of churches with the assistance of pension boards. In petitioners' cited example, the Second Circuit explained that "[i]t is not in dispute that Concord established its health and pension plans and that Concord is a church." *Coleman-Edwards v. Simpson*, 330 F. App'x 218, 220 (2d Cir. 2009).

PBGC, 446 U.S. 359, 375 (1980). Non-ERISA plans pose the same risks today. The court of appeals here noted "examples of hospitals that ... converted their plans into ones not governed by ERISA" under the church-plan exemption and then, "when those hospitals encountered financial trouble, their employees were left with severely underfunded and uninsured pension plans." Pet. App. 17a. "[L]ike the plan here, because no church had established those hospitals['] plans, there was no church to accept responsibility for the fate of the participants' retirement benefits." Pet. App. 17a-18a.

Petitioners, with remarkable disdain, dismiss the "grand total of three" pension failures (two hospitals and a publishing house) cited by the court of appeals because there was no proof "that imposing a church establishment requirement would have ensured the solvency of any of [them]." Pet. 30; *see* Br. of *Amicus Curiae* Americans United, 2015 WL 2402407, at *8-9 (detailing plan failures). Petitioners, however, disregard other instances in which purported church plans sponsored by hospitals have failed to pay promised benefits,[6] and still-unpublicized instances in which purported church plans are severely under-funded and uninsured. Petitioners' argument is also flawed because the church-establishment requirement would

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[6] *See, e.g.*, *Pension termination affects some St. Anthony employees*, The Times of NW Ind. (May 7, 2012), http://bit.ly/2cmEySV; *New Haven's St. Raphael workers face decision on pensions*, New Haven Register (July 18, 2013), http://bit.ly/2cjlSRP; *Ex-Workers Accuse Chicago Hospital Of Defying ERISA*, Law360 (June 7, 2016), http://bit.ly/2czCUQq.

have required the plans to comply with ERISA (and thus operate so as to avoid failure) and obtain insurance (and thus protect employees if failure occurred). In any event, a church that establishes a plan at least makes a promise to employees regarding their benefits, which creates a legal (and certainly a moral) obligation to keep that promise. No church or association of churches stands behind Advocate's Plan.

The costs of further delay in this litigation will be borne by 33,000 employees, whose pensions will continue to be subject to precisely the risks, abuses, substandard provisions, and lack of reasonable reporting and disclosure that Congress targeted when it enacted ERISA. The complaint alleges current deficiencies in Advocate's Plan. Without ERISA, nothing would protect Advocate's employees from even more serious abuses in the future.

3. Petitioners argue that "[i]t is hard to overstate the burden and havoc" that the court of appeals' decision would create. Pet. 2. Because the extent of petitioners' ERISA violations and the scope of necessary relief have not yet been litigated or resolved, petitioners' contention at this interlocutory stage is pure speculation. Conceding that the Plan's current benefits are substandard, petitioners assert that they would have to "restructure their participation, vesting, and accrual rules to comply with ERISA," that they may have to renegotiate collective-bargaining agreements, and that they would "have to begin paying premiums to the PBGC." Pet. 19-20. In short, they would have to operate their plans—as do their secular competitors—in accordance with the requirements that Congress deemed necessary to ensure that employees are

treated fairly and their promised pensions are secure.

Petitioners erroneously claim that complying with ERISA would be "potentially irreversible" if the decision of the court of appeals were ever overturned. Pet. 19. The health system in the *Saint Peter's* case operated under ERISA for more than 30 years before reversing itself, claiming church-plan status, and ceasing compliance. 810 F.3d at 177. The plan in *Dignity* also operated as an ERISA plan before switching to purported non-ERISA status. *See Rollins v. Dignity Health*, 59 F. Supp. 3d 965, 970 (N.D. Cal. 2014) ("In 1992, CHW's Board of Directors decided to *retroactively* operate the Plan as an exempt church plan[.]") (emphasis added). Indeed, the PBGC has reimbursed *hundreds* of plans for previously paid premiums when, after years of operating as ERISA plans, they decided to claim church plan status; that number includes a predecessor of Advocate that somehow made such an "irreversible" switch.[7]

Compliance with ERISA's disclosure, administrative, funding, and insurance requirements entails additional expense (as well as additional protection for employees), Pet. 19, but that merely underscores the substantial economic benefit bestowed upon entities like Advocate that is not available to analogous secu-

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[7] *See Status of Church Plan Refund Requests*, http://www.pensionrights.org/sites/default/files/docs/listing_of_pbgc_church_plan_refunds_1991_-_2005.pdf (262 PBGC refunds from 1991 to 2006, including Advocate predecessor Lutheran General Health System, #215 on the list).

lar nonprofits. In any event, the PBGC has a demonstrated history of reimbursing previously-paid premiums when ERISA-covered plans subsequently claim to be exempt church plans. *See supra* note 7. Petitioners offer no reason to believe that employers and employees would be unable to renegotiate collective bargaining agreements if and when necessary to comply (or reverse compliance) with ERISA; again, the history of plans switching in and out of ERISA status refutes petitioners' contention.

Petitioners also assert that, "because of ERISA compliance costs," Pet. 21, the decision in this case "could force some church-affiliated employers to abandon defined benefit plans in favor of defined contribution plans that shift investment risks from the employer to individual employees." Pet. 20. That too is pure speculation, and in any event ignores that existing underfunded and uninsured defined benefit plans now impose significant risks on plan participants. When Congress enacted ERISA, it sought to prevent employers from recruiting and retaining employees with the illusory promise of substandard defined benefit pension plans. The "compliance costs" to which petitioners object are just the costs of fairly operating and insuring pension plans, in accordance with the standards that Congress found necessary.

4. The complaint in this case illustrates the costs to employees. The complaint alleges that Advocate's pension plan is underfunded. Compl. ¶¶4, 60. Because this case arises on petitioners' motion to dismiss, that allegation must be taken as true. Petitioners' response is to cite a financial statement, *see* Pet. 11, that

does not refer to ERISA, has never been subject to adversary testing, and is based upon undisclosed assumptions. It should be disregarded.

Even if petitioners' claim that the Plan is adequately funded in its current, substandard configuration were taken at face value, that would simply demonstrate the costs to employees of denying ERISA coverage. For example, the Plan currently provides that employees who work less than five years receive nothing. ERISA, however, requires full vesting after three years. 29 U.S.C. §1053(f)(2). Advocate's financial projections no doubt rely on its current more favorable (but illegal under ERISA) five-year vesting schedule. ERISA imposes numerous other requirements on plans, including prohibiting "backloading," *i.e.*, providing most benefits only late in an employee's career, *see* 29 U.S.C. §1054; prohibiting amendments that reduce plan benefits, *see id.* §1054(g); and requiring employers to stand by their pension promises rather than permitting them to pay only those benefits that can be funded by existing plan assets. *See* John Langbein et al., *Pension and Employee Benefit Law* 187-88 (6th ed. 2015). It is uncertain at this stage of the litigation whether Advocate has or has not complied with those requirements, what the costs of doing so would be, or how they would affect the Plan's financial position. But if the Plan is indeed not governed by ERISA, there is nothing that would prevent Advocate from engaging in such substandard, or even reckless, practices in the future, to its employees' detriment.

C. Advocate's Exaggerated Claims of Injury from Allowing this Litigation to Continue Are Without Merit

Petitioners' other arguments are without foundation.

1. Petitioners state that Advocate is a "nonprofit entity" that "provided over $652 million in community benefits" in 2014. Pet. 22. They argue that allowing this litigation to proceed (and protecting their employees under ERISA) "would come at the expense of destitute citizens of Illinois who rely on the free care and other free services that Advocate provides." *Id.*

Advocate's contributions to the community are in fact on par with those of its secular competitors who *also* comply with ERISA. Advocate's $652 million in benefits was about 12.5% of the $5.2 billion in revenues on its 2014 financial statement.[8] Other large, secular health-care providers in Illinois spent similar proportions of their revenue on comparable community benefits. For example, the University of Chicago Medicine's $186.5 million of community benefits was about 12.9% of its revenues of $1.4 billion in 2014.[9] Edward-Elmhurst Healthcare's $157.9 million of community benefits was about 14.6% of its revenues of

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[8] *See* http://bit.ly/2cjOhY8.

[9] *See* http://bit.ly/2cSyTmy (community benefits); http://bit.ly/2crxKEa (financial statement).

$1.1 billion in 2014.[10] For fiscal year 2015, Northwestern Memorial HealthCare's $543.5 million of community benefits was about 14.0% of its $3.9 billion in revenues.[11]

In fact, federal and state law require all nonprofit, and most for-profit, hospitals to provide community benefits. Under 42 U.S.C. §1395dd, all hospitals receiving Medicare funds must treat emergency patients regardless of their ability to pay. To remain tax-exempt, nonprofit hospitals have long been required to provide community benefits. *See* IRS Rev. Rul. 69-545, 1969 WL 19168 (Jan. 1, 1969). The Affordable Care Act imposes additional obligations. 26 U.S.C. §501(r). Laws in many states, including Illinois, also require nonprofit hospitals to provide charitable care and other community benefits to justify their tax-exempt status. *See Provena Covenant Med. Ctr. v. Dep't of Revenue*, 925 N.E.2d 1131 (Ill. 2010). Advocate must provide these community benefits regardless of the ERISA status of its pension plans.

2. Petitioners' other hyperbolic claims should be rejected. Petitioners argue that Advocate faces "billions of dollars in retroactive penalties." Pet. 21. But ERISA penalties are authorized "in the court's discretion." 29 U.S.C. §1132(c)(3). Petitioners offer no example of such a massive penalty award in an ERISA

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[10] *See* http://bit.ly/2cSzi8K.

[11] *See* http://bit.ly/2cgF3kz (community benefits); http://bit.ly/2cAeB4Q (financial statement). Respondents were unable to locate 2014 data for Northwestern Memorial HealthCare.

case, and they presumably believe that it would be a clear abuse of discretion to award such a penalty here. In any event, petitioners' concerns are premature in this interlocutory posture.

Petitioners contend that ERISA would require Advocate "to eliminate any religious or socially responsible investment criteria that might conflict with ERISA's" fiduciary duties, although they do not assert that Advocate itself uses any such criteria. Pet. 19-20. In any event, ERISA's duty to act "solely in the interest of participants," 29 U.S.C. §1104(a)(1), does not prohibit screening morally objectionable investments if (as is usually the case) available alternative investments are likely to perform on par with those that are screened out. *See* 29 C.F.R. §2509.2015-01 (2015).[12] Nor does it impose any *additional* burden on Advocate. Advocate's own plan documents (like most such documents) already require that the plan fiduciaries act "solely in the interest of participants and beneficiaries of the plans." *See* (Dkt. #35-13 §1.2); (Dkt. #35-2 §17.12).

III. PETITIONERS' PLAN IS NOT A "CHURCH PLAN"

For the reasons given by the Third, Seventh, and Ninth Circuits, the statute makes clear that a plan that is not established by a church is not an ERISA-exempt church plan. Those courts correctly rejected

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[12] *See* 80 Fed. Reg. 65,135-01 (Oct. 26, 2015) (new Department of Labor bulletin superseding prior bulletin that had "unduly discouraged fiduciaries from considering ... environmental, social, and governance factors").

petitioners' arguments to the contrary.

A. The Text and Legislative History Both Make Clear that a Church Plan Must Be "Established" by a Church

1.a. Petitioners argue that respondents' reading renders superfluous the use of the term "established" before "includes" in subsection 33(C)(i). Pet. 26-27. That argument, however, is based on an incomplete quotation of the statute. The full language preceding the word "includes" is "[a] plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches[.]" 29 U.S.C. §1002(33)(C)(i). That phrase repeats the basic definition of a church plan from subsection 33(A). The remainder of subsection 33(C)(i) simply states that a church plan "includes" a plan "maintained" by a pension board. As the Third, Seventh, and Ninth Circuits all held, nothing about the structure or context of the language indicates the basic requirement that a church plan be established by a church has fallen by the wayside.

Moreover, petitioners' argument is that Congress viewed the identity of the entity that "maintained" a plan, and not the entity that "established" it, as relevant in determining church-plan status. Yet if that were Congress's intent, it would have eliminated "established by" from the statute altogether. Congress took exactly that step in a neighboring provision that exempts plans "established *or* maintained" by a government, 29 U.S.C. §1002(32); *see id.* §1003(b)(1), but Congress took a different approach here. Petitioners offer no reason why Congress would have required churches themselves to "establish *and* maintain" a

church plan, but then jettisoned the "establish" component when it came to secondary, non-church organizations.

b. Petitioners now disavow (Pet. 28) a concession made by counsel in *Saint Peter's* that illustrates the meaning of the statute here. The Third Circuit hypothesized a statute offering free insurance to a "person who is disabled and a veteran" and an amendment providing that "a person who is disabled and a veteran includes a person who served in the National Guard." 810 F.3d at 181. The court inquired whether under those provisions a *non*-disabled Guardsman would be entitled to free insurance. *Id. see* Pet. App. 12a. The hospital in *Saint Peter's* correctly answered no. Although counsel now say they have realized that the hypothetical is "irredeemably slanted," Pet. 28, it is in fact directly parallel to the statute at issue here.

Just as Congress in the hypothetical likely viewed disability as essential to qualify for free insurance, Congress here viewed the church's establishment of the plan as essential for the exemption. After all, the exemption here is for "church plans," *not* "religious plans." And to ensure that the exemption applies only to a church's plan, Congress provided that the church must "establish" the plan for its employees, even if another entity "maintains" it.

2.a. As each of the courts of appeals have found, the legislative history is entirely clear that subsection 33(C)(i) was intended to correct only the "technical problem" that arose because "[t]he large majority of church plans of the congregational denominations are administered by a pension board, a unit separate

from, but controlled by, the denomination." 124 Cong. Rec. 12,107 (1978) (statement of Rep. Conable).

Even aside from the direct evidence cited by the courts of appeals, *see* Pet. App. 18a-23a; *Saint Peter's*, 810 F.3d at 183-85; *Dignity*, 2016 WL 3997259, at *4-5, additional support is found in comments submitted to Congress by churches and their pension boards, including current *amicus curiae* the Church Alliance. Those comments reflected the churches' own understanding that the proposed amendments required church plans to be established by churches. *See* 125 Cong. Rec. 10,054-58 (1979); *Hearings Before the Subcomm. on Private Pension Plans & Emp. Fringe Benefits*, 96th Cong. 374-491 (1979).[13] Notably, the Executive Vice-President of the Pension Boards of the United Church of Christ, one of the two churches with which Advocate claims an affiliation, submitted statements to Congress explaining that: (1) the addition of subsection C(i) "include[ed] within [the definition of a 'church plan'] a plan *established by a convention or association of churches* but *maintained* by a separate corporation associated or controlled by those churches," *Hearings Before the Subcomm. on Private Pension Plans and Emp. Fringe Benefits*, 96th Cong. 461 (emphasis added); and (2) the addition of subsections C(ii) and (iii) was "intended to clarify the exemption of *churches* from the provisions of ERISA and to

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[13] The Church Alliance explained that "it is essential that the employees of [church] agencies be eligible for coverage *under the benefit plans of the church*." *Hearings Before the Subcomm. on Private Pension Plans and Emp. Fringe Benefits*, 96th Cong. 387 (emphasis added).

provide for the coverage of church agencies and ministers, wherever carrying out their ministry, *within the church plan*." 125 Cong. Rec. 10,055-56 (1979) (emphasis added). Advocate's Plan is not within the scope of the provision, as viewed by churches themselves at the time of the amendment.

b. Petitioners rely on a statement from Senator Talmadge that addressed an *earlier draft* of the 1980 amendments, which expressly permitted pension boards—but not other church-associated organizations—to establish church plans.[14] When the proposed church plan amendments were ultimately enacted, however, "the second 'established' was gone." *Saint Peter's*, 810 F.3d at 182; *see* Pet. 20a-21a. Notably, when Senator Talmadge proposed the *final* version of the amendment, he reiterated that his purpose was to accommodate "church plans which rather than being maintained directly by a church are instead maintained by a pension board maintained by a church." *Exec. Sess. of S. Comm. on Fin.*, 96th Cong. 40 (1980) (statement of Sen. Talmadge); *see also* 126 Cong. Rec. 20,245 (1980) (statement of Sen. Talmadge) (addressing plans "maintained by separately incorporated organizations called pension boards"). Statements in the legislative history regarding the important role of church agencies, *see* Pet. 33, addressed only why employees of such organizations should be included in church-established plans. *See*

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[14] *See* Pet. 12, 28 (citing 125 Cong. Rec. 10,052 (1979) ("Under [the original] church plan definition, there is a question whether the plan is established by a church, as it must be, or by a pension board.")).

125 Cong. Rec. 10,052 (1979) (statement of Sen. Talmadge). None suggested that such organizations could establish their own plans.

B. The Only Constitutional Problem in this Case Would Arise if Petitioners' View of the Statute Prevailed

The court of appeals' decision does not create any "constitutional doubts." Pet. 31. Far from providing an argument in favor of certiorari, the constitutional doubt doctrine counsels against further review in this case.

1. Petitioners' primary constitutional argument is that limiting the ERISA exemption to plans established by "a church or convention or association of churches," 29 U.S.C. §1002(33)(A), would violate the Establishment Clause. Pet. 31-32. They argue that there is a distinction between "congregational" churches, such as most Protestant denominations and Judaism, and "hierarchical" denominations, such as the Catholic Church. Pet. 31. According to petitioners, congregational denominations have "no single 'church' that can 'establish' a plan for the employees of myriad independent local congregations and affiliated organizations." Pet. 32. For that reason, petitioners argue, the statute unconstitutionally discriminates against congregational and in favor of hierarchical denominations.

No court has suggested that petitioners' argument has any merit, much less that it requires disregarding the clear meaning of the statute Congress enacted. In any event, there is no denominational discrimination here. An individual church of any denomination may

establish a church plan entitled to the ERISA exemption. Even if "no single 'church,'" Pet. 32, in a congregational denomination wants to establish a plan, a "convention or association of churches," 29 U.S.C. §1002(33)(A), may do so. There may be many reasons, doctrinal and practical, why a particular church or association of churches would choose not to establish a church plan. Congress need not make special provision so that organizations may establish a "church plan" even if the churches or associations of churches with which they claim affiliation choose not to do so. *See* Pet. App. 28a; *Dignity*, 2016 WL 3997259, at *10.

Petitioners also argue that the need to determine whether a particular entity is a "church" creates a "constitutionally dubious morass." Pet. 32. As the courts of appeals have recognized, however, "Congress has made these distinctions on numerous occasions before, distinguishing between churches and other religious organizations without constitutional concern." Pet. App. 27a (citing examples). As is typical in these cases, no "morass" is in sight here; there is no dispute that Advocate "established" the Plan and "[i]t goes without saying that Advocate is not a church." Pet. App. 5a.

3. The constitutional doubt doctrine would come into play in this case only if the Court accepted *petitioners'* view of the statute. This Court has recognized that "the government may (and sometimes must) accommodate religious practices." *Corp. of Presiding Bishop of Church of Jesus Christ of the Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987) (citation omitted). But it has also recognized that Congress

may not act with no purpose other than simply "favoring ... religious adherents collectively over nonadherents," *Board of Education v. Grumet*, 512 U.S. 687, 696 (1994), especially if doing so would burden nonadherents, *Estate of Thornton v. Caldor*, 472 U.S. 703, 708-09 (1985).

Such a forbidden raw preference for institutions claiming a religious affiliation is exactly what petitioners argue for here. The core purpose of the church-plan exemption was to avoid "examination of books and records" that "might be regarded as an unjustified invasion of the confidential relationship ... with regard to churches and their religious activities." S. Rep. No. 93-383 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4889, 4965. That purpose, however, could not justify an exemption for Advocate and similar institutions, since Advocate is not a church and since, because Advocate participates in Medicare and Medicaid and issues tax exempt bonds, it is already required to disclose its financial records and relationships in great detail. *See* Compl. ¶¶56, 215(A).

Moreover, granting ERISA exemptions to organizations like Advocate that participate in the marketplace has an additional defect. It imposes substantial costs on nonadherents, such as Advocate's employees, *see United States v. Lee*, 455 U.S. 252, 261 (1982), and its competitors. *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) ("[C]ourts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."). Far from creating constitutional doubt, the court of appeals' decision removes it.

4. The constitutional doubt doctrine provides an additional reason why this Court should deny certiorari. For the reasons given above, there is no basis for petitioners' constitutional argument. Nonetheless, granting certiorari in this case could easily require the Court to address the constitutional arguments advanced by one side or the other. In a case like this one that is in an interlocutory posture and in which there is no conflict in the circuits, prudence dictates that the Court should avoid a grant of review that could easily require an unnecessary constitutional determination.

IV. FURTHER REVIEW OF THIS CASE WOULD NOT ALTER THE RESULT, EVEN IF THE COURT AGREED WITH PETITIONERS

Further review is also unwarranted here, because the Advocate Plan would not qualify as a church plan even if the Court accepted petitioners' arguments on the question presented. Aside from the "established by a church" requirement, there are two alternative and independent statutory reasons why the Plan is not exempt from ERISA.

1. Subsection 33(C)(i) authorizes treatment as a church plan only for plans that are "maintained by an organization ... the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits." 29 U.S.C. §1002(33)(C)(i). The "principal purpose or function" of Advocate, which itself "maintain[s]" the plan, is to provide health care and related services, not to administer or fund a plan for retirement benefits. Accordingly, the Advocate Plan would not qualify as a church plan, even if the "established by a church"

requirement were disregarded.

2. The Plan does not satisfy the requirement in subsection 33(A) that a church plan be maintained "for" the "employees" of a church. *Id.* §1002(33)(A). Subsections 33(C)(ii)(II) and (iii) define employees of a church to include employees of organizations "controlled by or associated with" a church. Petitioners have never asserted that Advocate is "controlled by" a church. And petitioners' own cases, *Lown* and *Chronister*, demonstrate that Advocate is not "associated with" any church. Advocate does not receive funding from any church, and it imposes no denominational requirement on its employees, patients, or clients. *Compare* Compl. ¶¶47-55, *with Lown*, 238 F.3d at 548. The conventions or associations of churches with which Advocate claims affiliation do not have "any role in the governance of Advocate." *Compare* Compl. ¶52, *with Lown*, 238 F.3d at 548. Although Advocate asserts that it is "integral to the ministry of" those associations, Pet. 8-9, *Chronister* concluded that the fact that "operating a facility for health care is part of the healing ministry of the church" is insufficient to demonstrate that a hospital is "associated with" that church. 442 F.3d at 652-53.

3. Advocate's Plan accordingly would not be a church plan under ERISA, even if this Court held that a church plan need not be established by a church. For that reason, too, further review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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